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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1833

NADINE O. MONROE, APPELLANT

FLOYD R. MONROE, JR., APPELLEE

AN APPEAL FROM THE SUPREME COURT

OF THE STATE OF CONNECTICUT

MOTION OF APPELLEE TO DISMISS APPEAL

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INDEX

		Page
I	FACTS	2
II	THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE NOT TIMELY OR PROPERLY RAISED, OR EXPRESSLY PASSED ON	3
III	THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.	7
IV	CERTIORARI SHOULD BE DENIED.	16
V	CONCLUSION.	16

TABLE OF AUTHORITIES

DECISIONS

American Motorists Insurance Co. v. Starnes, 425 U.S. 637, 96 S.Ct. 1800, 48 L.Ed.2d 273 (1976). 8,10

Cincinnati Street R. Co. v. Snell, 193 U.S. 30, 24 S.Ct. 319, 48 L.Ed. 604 (1904) 8

Cohen v. Hurley, 366 U.S. 117, 81 S.Ct. 954, 6 L.Ed.2d 156 (1961). . .10,11

DiFrishia v. New York Central R.R., 279 F.2d 141 (3d Cir. 1960). 14

Diva Laboratorium Aktiengesellschaft v. DeLoney & Co., 237 F.Supp. 868 (D.C.D.C. 1965) 14

Florida Hill Road Corporation v. Commissioner of Agriculture, 164 Conn. 360, 321 A.2d 856 (1973) 11,12,13

Graciette v. Star Guidance, Inc., 66 F.R.D. 424 (D.C.S.D.N.Y. 1975) . 14

Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, No. 78-201, __ U.S. __, 99 S.Ct. 2100, __ L.Ed.2d __ (1979) 9,10

Jordan v. Gilligan, 500 F.2d 701 (6th Cir. 1974), cert. denied, 421 U.S. 991, 95 S.Ct. 1996, 44 L.Ed.2d 481 (1975). 15

Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). 9

Michigan v. Tyler, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978) 6

Monroe v. Gray, 553 F.2d 94 (2d Cir. 1977) cert. denied, 434 U.S. 827, 98 S.Ct. 104, 54 L.Ed.2d 85 (1977). 15

New York ex rel Bryant v. Zimmerman, 278 U.S. 63, 49 S.Ct. 61, 73 L.Ed. 184 (1928) 5

State v. Spellman, 153 Conn. 65, 212 A.2d 413 (1965) 6

Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969) 5

Vecchione v. Wohlgemuth, 426 F.Supp. 1297 (1977) 13

Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). 9

UNITED STATES CONSTITUTION, STATUTES, AND RULES

United States Constitution, First Amendment 7

United States Constitution, Fifth Amendment 7

United States Constitution, Fourteenth Amendment 7,10

42 U.S.C. §1983 13,15

United States Supreme Court Rule 16.1(b) 6

United States Supreme Court Rule 19.1(a) 16

CONNECTICUT CONSTITUTION, STATUTES, AND RULES

Connecticut Constitution, Article Fifth, §6 4,7

Connecticut Constitution, Article Ninth, §3 12

Connecticut General Statutes §52-434 . . . . . 4,5,7, 8,9,10, 11,12

Connecticut Practice Book §3063 . . 6

OTHER AUTHORITIES

Maltbie, Connecticut Appellate Practice 6

APPENDIX A-1

IN THE SUPREME COURT OF THE UNITED STATES

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No. 78-1833

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APPEAL FROM THE SUPREME COURT OF CONNECTICUT

MOTION OF APPELLEE TO DISMISS APPEAL

Appellee moves that the appeal herein taken be dismissed on the grounds that the federal questions sought to be reviewed were not timely or properly raised, or expressly passed on, and that said appeal does not present a substantial federal question.

I

FACTS

This is an appeal from a decision of the Supreme Court of the State of Connecticut holding that the Superior Court of the State of Connecticut committed no error in denying two motions by the appellant to vacate a judgment of divorce entered in 1973.

The appellant and appellee were married in 1956 and divorced in 1973. Five years later the appellant initiated proceedings to vacate the judgment of divorce. The appellant filed two motions to vacate, one in January 1978 and another in March 1978. In response to each motion, the appellee countered with a motion to erase because the plaintiff's motions were not filed within the term of court in which the judgment of divorce had been rendered, and were hence untimely. The Superior Court denied the motions of the plaintiff and granted the motions of the defendant. (See Appendix to Jurisdictional Statement, pp. A-16 to A-24.) The plaintiff thereupon appealed each denial to the Supreme Court of Connecticut which, in a unanimous decision, found no error in the decisions of the Superior Court.

The basic facts relating to the divorce proceedings are as follows: the appellant initiated an action for separation or divorce in 1969. As amended in 1973, the complaint charged the appellee with intolerable cruelty, wilful desertion and adultery, and sought child custody and financial relief. The appellee, after reference

of the case to a state referee, consented to having the matter heard as uncontested on the appellant's complaint. A hearing was held by the referee on February 6, 1973 in accordance with this understanding. Both the appellant and the appellee were present in the courtroom; each was represented by counsel; neither was called upon to testify. Counsel for the appellant presented the appellant's amended complaint and proposed the terms of a stipulated settlement to be incorporated in the judgment file. Although the stipulation for settlement was in writing neither the appellant nor the appellee had signed it. Counsel informed the court that "each aspect" of the settlement had been discussed by each counsel with each client and that each was willing to accept its terms if the court found the settlement to be fair and reasonable. No issues or questions, federal or otherwise, were raised by either party at the hearing. The court granted the appellant a divorce on the ground of desertion and incorporated the stipulated settlement into its judgment decree. Neither party ever appealed from the entry of this judgment. The appellee subsequently remarried.

II

THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE NOT TIMELY OR PROPERLY RAISED, OR EXPRESSLY PASSED ON.

The decision of the Connecticut Supreme Court, printed in full in the Appendix to the Jurisdictional Statement at pages A-2 to A-15, discussed the

issues of the jurisdiction of the Connecticut Superior Court to hear motions to vacate divorce judgments after expiration of the term of court during which the divorce was granted, and of the jurisdiction of the Connecticut Supreme Court to hear appeals from decisions of the superior court denying motions to vacate divorce judgments. The court held that the superior court did have jurisdiction to hear the motions to vacate and that the Connecticut Supreme Court did have jurisdiction to hear the appellant's appeal. The Connecticut Supreme Court then passed on "the more wide-ranging of the plaintiff's [appellant's] claims," i.e., that §52-434 of the Connecticut General Statutes, authorizing retired superior court judges to sit as state referees and to hear and decide cases referred to them with the written consent of the parties or their attorneys, was unconstitutional under the Connecticut constitution. The provisions of §52-434 are printed in the appendix to this motion to dismiss. The relevant provisions of the Connecticut Constitution are quoted in footnotes 3-5, Opinion of Connecticut Supreme Court, Jurisdictional Statement, at pp. A-14, A-15. The Supreme Court of Connecticut quickly disposed of this argument by pointing to the express provision of the Connecticut Constitution, Article Fifth, §6, which expressly sanctions §52-434 of the General Statutes. Article Fifth, §6, is quoted in the Jurisdictional Statement p. A-7. The Connecticut court did not discuss or pass on any issue of the constitutionality of §52-434 under the Constitution of the United States.

The court held that the appellant's authorized attorney of record gave his written consent to the referral thus explicitly satisfying the procedural requirements of §52-434. Further, noting that the appellant had not appealed the 1973 judgment of divorce, the court held that the judgment was not subject to collateral attack five years after entry of the judgment. Finally, the court held that there was a valid reference from the superior court to the state referee. Nowhere in the opinion did the court pass upon any federal issue. It can rightfully be assumed that the omission of the Connecticut Supreme Court to pass upon a federal question "was due to want of proper presentation in the state courts, unless the aggrieved party in this court can affirmatively show the contrary." Street v. New York, 394 U.S. 576, 582, 89 S.Ct. 1354, 1360, 22 L.Ed.2d 572, 579 (1969) (citation omitted). "Proper presentation" means "'that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time.'" Id. at 584, 89 S.Ct. at 1362, 22 L.Ed.2d at 580, quoting from New York ex rel Bryant v. Zimmerman, 278 U.S. 63, 67, 49 S.Ct. 61, 63, 73 L.Ed. 184 (1928). At the trial in 1973 the appellant raised no federal issue whatsoever. Through counsel she consented to the terms of the judgment and took no appeal. Raising the issue more than five years later can hardly be considered "in due time." The Connecticut Supreme Court has a rule which states that "The Supreme Court shall not be bound to consider any errors on an appeal unless they are specifically

assigned or claimed and unless it appears on the record that the question was distinctly raised at the trial and was ruled upon and decided by the court adversely to the appellant's claim, or that it arose subsequent to the trial." Connecticut Practice Book §3063 (1978). "Perhaps the most striking application of the rule is that the supreme court will not ordinarily consider the constitutionality of the statute unless the claim was made in the trial court...." Maltbie, Connecticut Appellate Practice 387 (2d Ed. 1957). The Connecticut Supreme Court has applied this rule in many cases. See, e.g., State v. Spellman, 153 Conn. 65, 212 A.2d 413 (1965). Cf. Michigan v. Tyler, 436 U.S. 499, 512, 98 S.Ct. 1942, 1951, 56 L.Ed.2d 486, 500, N. 7 (1978), where this Court noted: "Failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this court so long as the state has a legitimate interest in enforcing its procedural rule."

It is also apparent, from the jurisdictional statement filed in this court, that the appellant has not, even at this stage, presented her federal claims "with fair precision."

The appeal should, therefore, be dismissed on the ground "that the federal question sought to be reviewed was not timely or properly raised, or expressly passed on...." U.S. Supreme Court Rule 16.1(b).

III

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The appellant has alleged that §52-434 of the Connecticut General Statutes is violative of the First, Fifth and Fourteenth Amendments to the Constitution of the United States. She alleges that she was denied her right to petition the government for a redress of grievances, due process of the law and equal protection of the law. (Jurisdictional Statement p. 10) She has not, however, described with any precision how she has in any way been deprived of her federal constitutional rights. She has cited no authority for her argument that §52-434 of the Connecticut General Statutes is violative of the Constitution of the United States, or for her claims that she was otherwise denied any of the protection afforded by the constitution.

The appellant argues that she was "denied a constitutionally appointed and constitutionally accountable judge of the superior court...." Jurisdictional Statement p. 10. It is clear, however, that under the Connecticut Constitution, Article Fifth, §6 (Jurisdictional Statement p. A-15) the state referee to whom a case has been referred with the consent of the parties or their attorneys is both constitutionally appointed and constitutionally accountable.

With respect to the Fourteenth Amendment "[I]t is fundamental rights

which the 14th Amendment safeguards and not the mere forum which a state may see proper to designate for the enforcement and protection of such rights. Given therefore a condition where fundamental rights are equally protected and preserved, it is impossible to say that the rights which are thus protected and preserved have been denied because the state has deemed best to provide for a trial in one forum or another. It is not under any view the mere tribunal into which a person is authorized to proceed by a state which determines whether the equal protection of the law has been afforded, but whether in the tribunals which the state has provided equal laws prevail." American Motorists Insurance Co. v. Starnes, 425 U.S. 637, 644-645, 96 S.Ct. 1800, 1804, 48 L.Ed.2d 273 (1976) quoting from Cincinnati Street R. Co. v. Snell, 193 U.S. 30, 36-37, 24 S.Ct. 319, 321, 48 L.Ed. 604, 607 (1904). Because the referee "shall have and exercise the powers of the superior court in respect to trial, judgment and appeal in" cases referred to him, Connecticut General Statutes, §52-434, it is not open to challenge that fundamental rights are equally protected and preserved and that equal laws prevail in hearings before state referees, as before the superior court.

This court has consistently held "the fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"

Mathews v. Eldridge, 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976). Appellant was afforded such opportunity in this case. §52-434 expressly provides for a full panoply of procedural safeguards by providing that the referee "shall have and exercise the powers of the superior court in respect to trial, judgment and appeal in such case." Obviously, no party is obliged to have his or her case heard by a state referee--a case can be referred only "with the written consent of the parties or their attorneys." The case having been referred, the powers of the superior court were then held and exercised by the referee.

"The touchstone of due process is protection of the individual against arbitrary action of government." Wolff v. McDonnell, 418 U.S. 539, 558, 94 S.Ct. 2963, 2976, 41 L.Ed.2d 935 (1974). "It is axiomatic that due process 'is flexible and calls for such procedural protections as the particular situation demands.'....The function of legal process, as that concept is embodied in the constitution, and in the realm of fact finding, is to minimize the risk of erroneous decisions. Because of the broad spectrum of concerns to which the term must apply, flexibility is necessary to gear the process to the particular need; the quantum and quality of the process due in a particular situation depends on the need to serve the purpose of minimizing the risk of error." Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, No. 78-201, __ U.S. __,

99 S.Ct. 2100, 2106, __ L.Ed.2d __ (1979). (citations omitted) There can be no question but that appellant was afforded all process due under the Fourteenth Amendment.

Appellant has also argued that she was deprived of the equal protection of the laws in that §52-434 "creates a class of constitutionally-deprived litigants." Jurisdictional Statement p. 11. This claim is also completely without merit. In the first place no party is obliged to have his or her case heard by a referee. The appellant's attorney consented to the referral in writing. Furthermore, the litigants before a state referee are not constitutionally deprived inasmuch as the state referee has and must exercise all of the powers of a superior court judge. In the state referee system "fundamental rights are equally protected and preserved" and "equal laws prevail." American Motorists Insurance Co. v. Starnes, 425 U.S. 637, 644-645, 96 S.Ct. 1800, 1804, 48 L.Ed.2d 263 (1976). Because there is no discrimination on the face of the statute or in its operation, there was no denial of the appellant's right to equal protection of the law.

"[W]hat procedures are fair, what state process is constitutionally due, what distinctions are consistent with the right to equal protection, all depend upon the particular situation presented, and...history is surely relevant to these inquires." Cohen v.

Hurley, 366 U.S. 117, 130, 81 S.Ct. 954, 962, 6 L.Ed.2d 156, 165 (1961). The long and successful history of the referee system in Connecticut was traced in Florida Hill Road Corporation v. Commissioner of Agriculture, 164 Conn. 360, 365-366, 321 A.2d 856 (1973). There the court noted the "practical purpose" of the referee system "of relieving the [superior] court's crowded dockets of matters which can be more readily and conveniently tried in that manner." Id. at 367. The court observed that the position of state referee had served such purpose since 1889. Id. at 365. In addition to the right of appeal from the judgments of referees and in addition to the requirement that referrals be made only with consent, there are other safeguards. Contrary to appellant's assertion (Jurisdictional Statement p. 13) that referees are not subject to periodic renomination, review and reappointment, §52-434 specifically provides that "The chief justice of the supreme court may designate as trial referees, from among the state referees, those to whom cases may be referred, and no case of any adversary nature shall be referred to any referee other than one so designated....No such designation... shall be for a term of more than one year." (Appendix p. A-3) (The appellant's quotation of the statute, Jurisdictional Statement pp. 3-5 omits the sentence relative to trial referees.) Trial referees' "successive appointments by the chief justice are limited to a term

of not more than one year." Florida Hill Road Corporation v. Commissioner of Agriculture, 164 Conn. 360, 367 (1973).

Also contrary to appellant's assertion, (Jurisdictional Statement p. 13) state trial referees are liable to impeachment under the Connecticut Constitution, Article Ninth, §3: "The governor, and all other executive and judicial officers, shall be liable to impeachment...."

Furthermore, even where the parties consent to a referral, a referral is discretionary with the superior court which, in the words of §52-434, "may" refer cases to a referee.

The appellant's libelous statements concerning counsel and the state referee (e.g., Jurisdictional Statement pp. 7-8) have no support in the records, and indeed cannot be supported because they are false. The Connecticut Supreme Court, in the decision appealed from, specifically found that "there are no facts in the record before us that would warrant a conclusion that there has been a miscarriage of justice. The plaintiff claims that she was coerced by her attorney into agreeing to the order of reference and into appearing before the referee, but there are no findings of fact to support those allegations." (Jurisdictional Statement p. A-9)

The appellant alleges that, because the referees are over age 70,

"their physical and mental abilities are diminishing." (Jurisdictional Statement p. 13) She has offered no evidence in support of this conclusion. Furthermore, "The duties of state trial referees are usually less rigorous than those of trial judges and are entirely consistent with the constitutionally mandated retirement age for judges which 'rests upon a public belief that there comes a time in the life of a man when it is better for the public interest that he be not charged with the responsibility of continuous daily work of so complete absorption as the high judicial office calls for.'" Florida Hill Road Corporation v. Commissioner of Agriculture, 164 Conn. 360, 368 (1973).

The quotations from the three district court decisions and the one court of appeals decision cited by appellant do not support her claims.

Vecchione v. Wohlgemuth, 426 F.Supp. 1297 (1977) was a 42 U.S.C. §1983 suit challenging a Pennsylvania law authorizing seizure of property of mental health patients. The court, in denying the defendant's motion to vacate and/or modify, noted that the defendant's counsel, like the appellant's counsel here, had consented to the entry of the original decree. 426 F.Supp. at 1312. The court also noted the extraordinary length of time which elapsed between the time of entry of judgment and the time of filing a motion to vacate. 426 F.Supp. at 1309. (Two years had elapsed in Vecchione; five

years elapsed in the instant case.) Citing equitable principles the court also noted "the potentially damaging impact of 60(b) relief upon the party who, through litigation, had obtained what appeared to be a final judgment." 426 F.Supp. at 1311. Such principles are applicable in the instant case where the appellee, in reliance on the final judgment, remarried. The court in Vecchione, quoting from DiFrishia v. New York Central R.R., 279 F.2d 141 (3d Cir. 1960), stated that that "court's observations have special meaning in the present case: '[T]he defendant had its opportunity to have the [jurisdictional] issue heard and to present its position but chose to admit the allegations of the plaintiff's complaint. Thereafter it fully participated in the appropriate discovery and pretrial procedures preparatory to trial of the action on the merits....A defendant may not play fast and loose with the judicial machinery and deceive the courts.'" 426 F.Supp. at 1309.

Graciette v. Star Guidance, Inc., 66 F.R.D. 424 (D.C.S.D.N.Y. 1975), a suit in the district court alleging copyright infringement, in which the court held that a California district court had no in personam jurisdiction over a New York resident, has no bearing on the instant case.

Diva Laboratorium Aktiengesellschaft v. DeLoney & Co., 237 F.Supp. 868 (D.C.D.C. 1965), an action to compel the patent office to register a trademark, held that the late filing of the action did not deprive the court of subject matter jurisdiction and that the

defendant waived any claim in that regard by not raising the late filing as a defense. The court also held that failure to assert improper venue amounted to a waiver. In the instant case it has been established that the appellant through her authorized counsel of record consented to the reference to a state referee and consented to the judgment. It must, therefore, be held that she waived any claims in this regard. See opinion of Connecticut Supreme Court, Jurisdictional Statement, p. A-9.

Jordan v. Gilligan, 500 F.2d 701 (6th Cir. 1974), cert. denied, 421 U.S. 991, 95 S.Ct. 1996, 44 L.Ed.2d 481 (1975), held that in a suit under 42 U.S.C. §1983 the Eleventh Amendment precludes an award of attorney's fees against a state. The case has no bearing on the instant case.

This is not the first time that the appellant has sought recourse to the federal courts alleging insubstantial federal questions pertaining to her divorce. See Monroe v. Gray, 553 F.2d 94 (2d Cir. 1977), cert. denied, 434 U.S. 827, 98 S.Ct. 104, 54 L.Ed.2d 85 (1977). The appellant's complaint in that case was dismissed for failure to state a claim upon which relief could be granted. The court of appeals affirmed and following the denial of certiorari by this Court, the appellant reverted to the state courts. Having failed in her claims before two Superior Court judges and the Connecticut Supreme Court, she again seeks to invoke the jurisdiction of the federal judiciary. Her claims now are no more substantial than they

were in the prior litigation.

IV

CERTIORARI SHOULD BE DENIED.

The appellant has requested that the appeal "be regarded and acted upon as a petition for a writ of certiorari." (Jurisdictional Statement p. 2) Because there are no special and important reasons therefor, because the Connecticut Supreme Court has not decided a federal question of substance not theretofore determined by this Court, and because the Connecticut Supreme Court has not decided a federal question in a way probably not in accord with applicable decisions of this Court, a petition for a writ of certiorari should be denied. U.S. Supreme Court Rule 19.1(a).

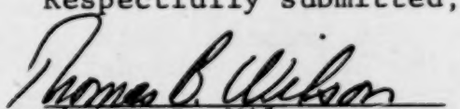
V

CONCLUSION

For the reasons stated the appellee's motion to dismiss the appeal should be granted and the appeal dismissed.

Dated at Groton, Connecticut, this 28th day of June 1979.

Respectfully submitted,



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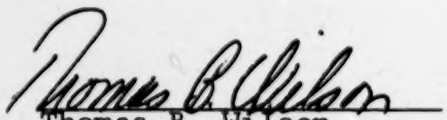
I, Thomas B. Wilson, attorney for Floyd R. Monroe, Jr., Appellee, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 3rd day of July 1979 I served three copies of the foregoing motion of appellee to dismiss appeal on all parties required to be served as follows: on Nadine O. Monroe, appellant, by mailing three copies in a duly addressed envelope with first class postage prepaid to Nadine O. Monroe, 16 Morgan Street, New London, Connecticut 06320.



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MOTION OF APPELLEE TO DISMISS APPEAL

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Connecticut General Statutes, §52-434. Retired judges as state referees. Hearings. Compensation. Trial referees. Appointment of additional referees.

Each judge of the supreme court, each judge of the superior court and each judge of the court of common pleas who ceases or has ceased to hold office because of retirement other than under the provisions of section 51-49 shall be a state referee during the remainder of his life. The superior court may, with the written consent of the parties or their attorneys, refer any case pending before such court in which the issues have been closed to such a state referee who shall have and exercise the powers of the superior court in respect to trial, judgment and appeal in such case. Each judge of the circuit court who has ceased to hold office because of retirement other than under the provisions of section 51-49 shall be a state referee during the remainder of his life to whom the superior court may, with the written consent of the parties or their attorneys, refer any case pending in such court in which the issues have been closed and which the judges of the superior court may establish by rule to be the kind of case which may be heard by such referees. Such referee shall hear such case and report the facts to the court by which the case was referred. Each judge of the juvenile court who ceases or has ceased to hold office because of retirement other than under the provisions of section 51-49

shall be a state referee during the remainder of his life to whom a judge before whom any juvenile matter is pending may, with the written consent of a child concerned, either of his parents or his guardian or his attorney, refer any juvenile matter pending. Such referee shall hear such matter and report the facts to the court for the district from which the matter was referred. Each hearing by a state referee shall be held in a suitable room, to be provided by the commissioner of administrative services, in a courthouse in the judicial district where the case is pending unless the parties or their attorneys stipulate in writing that such hearing may be held elsewhere. Such state referee may have the attendance of a sheriff or deputy sheriff at any hearing before him, and such sheriff or deputy sheriff shall receive the same compensation provided for attendance at regular sessions of the court from which the case was referred which compensation shall be taxed by such state referee in the same manner as similar costs are taxed by the judges of the court. Such state referee may compel the attendance of any witness summoned to appear before him at any hearing, in the same manner as attendance of any witness may be compelled in the referring court, and may punish for any act of contempt committed in his presence while engaged in such hearing in the same manner and to the same extent as judges of such court. Each state referee shall receive, for acting as such referee or as a single auditor or committee of any court, in addition to his retirement salary,

the sum of one hundred dollars and his expenses, including mileage, for each day he is so engaged, said sums to be taxed by the court making such reference in the same manner as other court expenses. The chief justice of the supreme court may designate as trial referees, from among the state referees, those to whom cases may be referred, and no case of any adversary nature shall be referred to any referee other than one so designated. The chief justice may also appoint, from qualified members of the bar of the state, so many state referees as he may from time to time deem advisable or necessary. No such designation or appointment shall be for a term of more than one year. Each state referee appointed by the chief justice from members of the bar shall receive such reasonable compensation and expenses as may be determined by him.